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No. 92-470

In the Supreme Court of the United States

OCTOBER TERM, 1992

WILLIAM B. SCHEIDT AND WANDA C. SCHEIDT,
PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

KENNETH W. STARR
Solicitor General

JAMES A. BRUTON
Acting Assistant Attorney General

GILBERT S. ROTHENBERG
REGINA S. MORIARTY
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Whether a notice of deficiency mailed to petitioners by the Internal Revenue Service at an incorrect address, but actually received by petitioners in ample time for them to file a timely Tax Court petition, was a valid statutory notice as of the date on which it was mailed.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-8) is reported at 967 F.2d 1448. The opinion of the Tax Court (Pet. App. 9-19) is reported at 49 T.C.M. (CCH) 1501. The opinion of the Tax Court on motion for reconsideration (Pet. App. 20-23) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 18, 1992. The petition for a writ of certiorari was filed on September 16, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. When the Internal Revenue Service determines that a taxpayer owes additional income tax, the Service must generally issue a "notice of deficiency" before it may assess and collect the increased amount. The notice of deficiency sets forth the amount of, and reasons for, the additional tax due. Under Section 6212 of the Internal Revenue Code, a notice of deficiency mailed by certified or registered mail to the taxpayer "at his last known address" is "sufficient." 26 U.S.C. 6212(b)(1).

One purpose of the deficiency notice is to permit the taxpayer to challenge the Service's determination in the United States Tax Court before paying any additional tax.[1] Thus, 26 U.S.C. 6213(a) provides that a taxpayer may petition the Tax Court for review of an asserted deficiency "[w]ithin 90 days * * * after the notice of deficiency * * * is mailed." During that 90-day period (and, if a timely petition for review is filed, until the conclusion of judicial proceedings), the Service is ordinarily barred from assessing or collecting the additional tax. *Ibid.*[2] Conversely, the normal three-year statute of limitations on assess-

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[1] Alternatively, a taxpayer may pay the additional tax asserted (thus halting the accumulation of statutory interest on the amount ultimately determined to be due) and sue for a refund in the district court or the United States Claims Court. See generally 26 U.S.C. 6532, 7422; 28 U.S.C. 1346(a)(1).

[2] There are exceptional situations involving "termination assessments" and "jeopardy assessments" where the Service is not barred from assessing and collecting taxes pending Tax Court review. See 26 U.S.C. 6213(a), 6851, 6852, 6861. Those exceptions are not involved in this case.

ments is tolled during the period that assessment is barred, and for 60 days thereafter. See 26 U.S.C. 6503(a)(1).

2. On June 9, 1982—six days before expiration of the three-year statute of limitations with respect to petitioners' 1978 tax return—the Service sent to petitioners, by certified mail, a notice of deficiency concerning their 1978 and 1979 federal income taxes. Pet. App. 9. The notice was addressed to Post Office Box 20711, Oklahoma City, Oklahoma. Pet. App. 11. Petitioners had, however, relinquished Box 20711 sometime during 1981, and had instead begun renting Box 20748 in the same post office. Pet. App. 10.[3] In addition, on May 19, 1981, petitioners had executed a power of attorney pertaining to their 1978 and 1979 federal income tax returns, directing the Service to send notices and other written communications with respect to those returns to petitioners at 13108 Green Valley Drive, Oklahoma City. *Ibid.*

On or about June 10, 1982, the Village Branch Post Office received the Service's certified letter addressed to petitioners at Box 20711. The post office left a notice in Box 20711 indicating that a certified letter for petitioners was waiting to be picked up. Usually, the post office leaves three such notices with a patron. If certified mail is still unclaimed on the 15th day after the initial notice, it is generally returned to the sender. Pet. App. 12.[4]

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[3] The forwarding order from Box 20711 to Box 20748 had expired on December 31, 1981, and thus was not in effect when the Commissioner mailed the notice of deficiency. Pet. App. 10.

[4] The post office clerk in charge of handling certified mail testified that she had been on vacation in the early part of

The record in this case does not indicate that the Service's certified letter was returned. Pet. App. 12. Instead, the responsible post office clerk speculated that while sorting the mail to be returned she realized that the letter had the wrong box number on it, and therefore placed a certified mail notice in Box 20748 and allowed several extra days for it to be picked up. Tr. 16-17. What is clear is that on July 6, 1982, petitioner William Scheidt received delivery of the Service's letter containing the deficiency notice for 1978 and 1979. Pet. App. 12.

Petitioners mailed their petition for Tax Court review of the 1978 deficiency on September 4, 1982—less than 90 days after the mailing of the notice of deficiency (and thus within the time prescribed by 26 U.S.C. 6213(a)), and 60 days after petitioners actually received the Service's notice. See Pet. App. 12. Petitioners subsequently filed a motion to dismiss their petition for lack of jurisdiction. They contended, see Pet. App. 9, that assessment of additional 1978 taxes was barred by the statute of limitations because the notice of deficiency was not mailed to their "last known address," and therefore could not be effective to toll the statute of limitations before its actual receipt by petitioners—at which point the statute had already expired. Alternatively, they contended that the notice could not be effective before receipt because the post office's delivery of the Service's letter to petitioners' new address constituted a constructive return and "remailing" of the notice

June, and that it was possible that her work had piled up, preventing her from handling the certified mail as promptly as usual. Pet. App. 12.

after the statute of limitations had expired, or because the notice did not reach petitioners in the "due course" of the mail. *Ibid.*

3. a. The Tax Court denied petitioners' motion to dismiss. Pet. App. 19. The Court found that the Commissioner mailed the notice of deficiency on June 9, 1982, prior to expiration of the statute of limitations, and that the notice was not "remailed" at any time. *Id.* at 13. The court determined that, under the circumstances, the Commissioner had not mailed the deficiency notice to petitioners' "last known address." The court noted, however, that because petitioners actually received the notice in sufficient time to file (and did in fact file) a timely petition, *ibid.*, they were not prejudiced by the improper address or by any delay in receipt. *Id.* at 16-17. The court therefore concluded that the deficiency notice was "effective for all purposes from the time of its mailing." *Id.* at 17.

b. The Tax Court denied petitioners' motion for reconsideration. Pet. App. 20-23. The court reiterated its holding that the notice of deficiency was valid, even though improperly addressed, because petitioners actually received the notice with ample time to petition for pre-payment review. *Id.* at 21. The court also rejected petitioners' additional arguments (i) that it was discriminatory to distinguish this situation from the situation where the Service remails a previously undelivered deficiency notice after expiration of the statute of limitations, and (ii) that the notice was invalid because its receipt was delayed by postal employees' "willful violation" of postal regulations. The court viewed these arguments as

obscuring the real issue, which was "whether the notice of deficiency was valid ab initio." *Id.* at 22.

4. The court of appeals affirmed. Pet. App. 1-8. It agreed with the Tax Court that a notice of deficiency which is actually received by a taxpayer with sufficient time to petition the Tax Court for redetermination of the asserted deficiency is valid as of the date the notice was mailed. *Id.* at 6-7. It accepted the Tax Court's holding—which petitioners did not challenge on appeal—that petitioners were not prejudiced by having only 63 days to file a petition. *Id.* at 7. Thus, the court held "that [petitioners] were adequately notified by the notice of deficiency mailed on June 9, 1982 and that the limitations period was tolled as of that date pursuant to § 6503(a)(1)." *Ibid.*

The court of appeals rejected, Pet. App. 7, petitioners' claim that the notice of deficiency was invalid because it was delayed or irregularly handled by the Post Office, and thus was not received in "the due course of the mail." The court found that such a claim had "no basis in the statutory scheme." *Ibid.* The court also found no support in the record for petitioners' theory that the postal clerk's apparent action in placing the notice of deficiency in the correct post office box (rather than returning it to the Service) somehow constituted a "remailing" by the Service after the expiration of the statute of limitations. *Id.* at 7-8.[5] Finally, the court rejected, *id.* at 8, petitioners' claim that it would violate their right to equal protection to distinguish between taxpayers (such as petitioners) who actually receive a

[5] Petitioners appear to have abandoned this argument in their petition to this Court.

timely but misaddressed notice of deficiency, and taxpayers who do not receive such a notice because it is returned to the Service and not remailed before the statute of limitations expires. The court found that distinction "clearly rational." *Ibid.*

ARGUMENT

1. Section 6212(b)(1) of the Internal Revenue Code, 26 U.S.C. 6212(b)(1), provides a "safe harbor" for the Service when it mails a notice of deficiency: so long as the notice is mailed to the taxpayer's "last known address," it will be "sufficient" to permit subsequent assessment of the asserted deficiency, even if it is never actually received by the taxpayer. See, *e.g.*, *Keado* v. *United States*, 853 F.2d 1209, 1211-1212 & n.9 (5th Cir. 1988); *King* v. *Commissioner*, 857 F.2d 676, 681 (9th Cir. 1988). Because the Tax Court held that in this case the Service did not mail the notice of deficiency to petitioners' "last known address," this safe harbor rule is neither applicable nor relevant here. It does not follow, however, that the notice sent to and received by petitioners was invalid.

As the court of appeals concluded, regardless of the address to which notice is sent, "[t]he statutory scheme for tax assessments contemplates that '[a] notice of deficiency that is *actually received* without delay prejudicial to the taxpayer's ability to petition the Tax Court is sufficient to toll the statute of limitations as of the date of mailing.'" Pet. App. 6 (emphasis added), quoting *Borgman* v. *Commissioner*, 888 F.2d 916, 918 (1st Cir. 1989). Petitioners in this case do not dispute that they received the Service's notice of deficiency without delay prejudicial to their ability to petition the Tax Court. Pet. 19;

Pet. App. 7. Petitioners thus received all that they were entitled to under the statute: adequate notice and the opportunity, of which they availed themselves, to obtain prepayment judicial review of their tax liability.[6]

Petitioners contend, Pet. 19, that a notice of deficiency that is not sent to the taxpayer's "last known address" must be *received* before the statute of limitations on assessment is suspended. This contention is expressly refuted, however, by the terms of 26 U.S.C. 6503(a)(1), which states that the statute of limitations is suspended "after the *mailing* of a notice under section 6212(a)" (emphasis added).[7]

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[6] Petitioners had a full opportunity to litigate the merits of the deficiency determination in the Tax Court, and there is accordingly no merit to their claim (see Pet. 20) that they are "innocent" taxpayers who were denied due process of law. See, *e.g.*, *Phillips* v. *Commissioner*, 283 U.S. 589, 597-599 (1931). Indeed, based on the rulings in this and similar cases, petitioners no longer dispute that if the statute of limitations does not bar assessment, they owe the approximately $1.5 million in taxes and interest at issue here. See *Gray* v. *Commissioner*, 88 T.C. 1306 (1987) (consolidated cases involving same abusive tax shelter in which petitioners invested), aff'd as to particular taxpayers *sub nom. Becker* v. *Commissioner*, 868 F.2d 298 (8th Cir. 1989); *Armstrong* v. *Commissioner*, 869 F.2d 1496 (9th Cir. 1989); *Adkins* v. *Commissioner*, 875 F.2d 137 (7th Cir. 1989); and *Kennedy* v. *Commissioner*, 876 F.2d 1251 (6th Cir. 1989). See also *Saviano* v. *Commissioner*, 765 F.2d 643 (7th Cir. 1985) (same tax shelter).

[7] Indeed, any notice of deficiency mailed near the end of the limitations period will likely be received after the limitations period would have expired absent the mailing, even where the notice was correctly addressed. Thus, despite petitioners' protestations to the contrary (Pet. 19), their receipt of the deficiency notice in this case after the date the limitations

Because timely actual receipt of a misaddressed deficiency notice fully satisfies the purposes of the statutory mailing requirement, the courts of appeals have consistently concluded that a notice so received is valid and effective as of the date of mailing. See *Clodfelter* v. *Commissioner*, 527 F.2d 754, 756-757 (9th Cir. 1975), cert. denied, 425 U.S. 979 (1976); *Borgman* v. *Commissioner*, 888 F.2d at 917; *McKay* v. *Commissioner*, 886 F.2d 1237, 1238-1239 (9th Cir. 1989); *Pugsley* v. *Commissioner*, 749 F.2d 691, 692-693 (11th Cir. 1985). See also *Sorrentino* v. *Ross*, 425 F.2d 213, 215 (5th Cir. 1970); *Berger* v. *Commissioner*, 404 F.2d 668, 673-674 (3d Cir. 1968), cert. denied, 395 U.S. 905 (1969); *Delman* v. *Commissioner*, 384 F.2d 929, 933-934 (3d Cir. 1967). There is no reason for this Court to review that conclusion, or its application by the court of appeals to the facts of this case.

2. The cases cited by petitioners are not to the contrary.[8] In *Tadros* v. *Commissioner*, 763 F.2d 89 (2d Cir. 1985), for example, the sole issue was whether the notice of deficiency, which the taxpayer never received, was mailed to the taxpayer's "last known address" for purposes of the statutory safe harbor rule. The court found that it was, and therefore that

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period would have expired had no deficiency notice been mailed is a common occurrence and of no consequence.

[8] Petitioners err in stating (Pet. 11) that the government "informed the Tenth Circuit" that there was a conflict among the circuit courts. Neither in its brief nor at oral argument did the government indicate to the court of appeals that other courts had reached differing results as to the validity of a deficiency notice actually received by a taxpayer in time to file a timely Tax Court petition.

the 90-day period began to run on the mailing date. 763 F.2d at 91-92. Nothing in the court's opinion speaks to the effect of actual receipt of a misaddressed notice within the time required for filing a timely Tax Court petition, and nothing in the facts of the case suggests that the court confronted that issue even indirectly.[9]

In *Sicker* v. *Commissioner*, 815 F.2d 1400 (11th Cir. 1987), the taxpayer received an incorrectly addressed notice of deficiency between 83 and 87 days after it was mailed, and did not file his Tax Court petition until the 91st day after the mailing. Under those circumstances, the court held that the taxpayer had clearly been prejudiced by having a maximum of only eight days in which to file his petition, and therefore refused to give effect to the notice as of the date of mailing. Despite petitioners' assertion (Pet. 14-15) to the contrary, however, the eight days or less involved in *Sicker* is hardly comparable to the 63 days available to petitioners to prepare and file their Tax Court petition. The *Sicker* court made clear that if the taxpayer there had received the misaddressed notice "with ample time to file a petition for redetermination," 815 F.2d at 1401, the notice would have been "deemed to be effective when mailed." *Ibid.* In the

[9] Had the *Tadros* court concluded that notice had not been mailed to the taxpayer's last known address, the case would have resembled *Wallin* v. *Commissioner*, 744 F.2d 674 (9th Cir. 1984), where the deficiency notice was misaddressed and was *not* received by the taxpayer within 90 days of the original mailing. Under those circumstances, the *Wallin* court concluded that the misaddressed notice was not effective. But those circumstances are not apposite here.

present case, petitioners have never disputed that they had ample time to file a Tax Court petition following their actual receipt of the deficiency notice. See Pet. App. 7; Pet. 19. Indeed, they in fact filed a timely petition. See page 4, *supra*.

The decisions in *Ward* v. *Commissioner*, 907 F.2d 517 (5th Cir. 1990); *Kennedy* v. *United States*, 403 F. Supp. 619 (W.D. Mich. 1975), aff'd mem., 556 F.2d 581 (6th Cir. 1977); *McPartlin* v. *Commissioner*, 653 F.2d 1185 (7th Cir. 1981); and *Crum* v. *Commissioner*, 635 F.2d 895 (D.C. Cir. 1980), upon which petitioners also rely, are similarly inapposite. In each case, the deficiency notice was not mailed to the taxpayer's last known address *and* was not received in time to file a Tax Court petition within 90 days of the original mailing.[10] None of the cases petitioners cite dealt with a clearly non-prejudicial address error of the type involved in this case.[11]

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[10] Petitioners also cite *DiViaio* v. *Commissioner*, 539 F.2d 231 (D.C. Cir. 1976). Pet. 17. In *DiViaio*, the Service sent a notice of deficiency to the warden of a federal prison with the request that he serve the notice on an inmate taxpayer. The court concluded that the Service had chosen to appoint the warden as its agent to make personal service, rather than mailing the notice directly to the taxpayer in accordance with 26 U.S.C. 6212, and therefore held that the statutory notice-on-mailing rule was simply inapplicable. 539 F.2d at 234. *DiViaio*'s unique facts and holding lend no support to petitioners' arguments in this case.

[11] Compare *Commissioner* v. *Stewart*, 186 F.2d 239, 241 (6th Cir. 1951) (same provisions in prior law) (where taxpayer received notice and filed a timely Tax Court petition, any error in addressing notice to taxpayer's attorney was harmless and did not affect validity of notice); *Eisenberg* v. *Commissioner*, 47 T.C.M. (CCH) 729, 730 (1983), aff'd mem., 753 F.2d

Finally, petitioners contend (Pet. 9-10 & nn.1-2, 16) that the decision below conflicts with the Fourth Circuit's decision in *Powell* v. *Commissioner*, 958 F.2d 53 (4th Cir.), cert. denied, No. 92-452 (Nov. 2, 1992). *Powell* held that a notice of deficiency properly addressed to taxpayers at their last known address[12] could be invalidated by alleged postal and administrative mishandling that resulted in the taxpayers' not receiving the notice in time to file a timely Tax Court petition. 958 F.2d at 56. In this case, in contrast, the notice of deficiency was improperly addressed, but was received by petitioners in time for them to file a timely Tax Court petition. In our view, the fact of timely actual receipt *vel non* underlies both the decision below (where the Service could not claim the benefit of the statutory safe harbor for proper mailing) and the decision in *Powell* (where the

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1078 (7th Cir. 1985) (even if notice was improperly mailed or mishandled by post office, it was effective as of the mailing date where taxpayer actually received it within 20 days of mailing and thus had ample opportunity to file a timely Tax Court petition).

[12] Petitioners question, Pet. 10 n.1, our position that the court of appeals' decision in *Powell* did not disturb the Tax Court's finding that the Service mailed its notice of deficiency to the Powells' "last known address." We think it clear that the *Powell* court based its holding on what the court perceived as a failure of due diligence *after* the Service knew or should have known that the notice had failed to reach the taxpayers at the initial address. See 958 F.2d at 56-57. In any event, the important distinction between this case and *Powell* is that the taxpayers in this case actually received notice of the asserted deficiency in a timely manner, regardless of the address to which the notice was mailed.

Fourth Circuit apparently considered it inequitable to apply the statutory safe harbor in the face of alleged postal errors and administrative laxity, and therefore gave effect to the notice only from the time of actual receipt). Because that fact also distinguishes the two cases, we perceive no fundamental conflict between the two decisions that requires the intervention of this Court.[13]

3. Petitioners seize on language used in passing by the court in *Berger* v. *Commissioner*, *supra*, to argue that three courts of appeals have required that an improperly addressed notice be received "in due course" in order to be effective from the date of mailing. See Pet. 12. As developed in the petition, see Pet. 12-15, this argument appears merely to restate the proposition that the courts will not give effect to a misaddressed notice of deficiency if the consequent delay in its receipt actually prejudices the taxpayer's ability to file a timely petition for review in the Tax Court. That proposition is consistent with the government's position and with the cases cited above, and cannot help petitioners in this case in view of the Tax

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[13] We asked this Court to review the decision in *Powell*, see Pet. for Cert. in No. 92-452, and we agree that the Fourth Circuit's conclusion in that case that a postal error resulting in non-delivery of a properly mailed notice can prevent the notice from tolling the limitations period is inconsistent with the Tenth Circuit's reasoning in rejecting petitioners' "due course of the mail" argument. See *id.* at 13-14. It also conflicts with numerous other appellate decisions. See, *e.g.*, *id.* at 10-14 & n.14, and cases there cited. It is important to recognize, however, that although the court below articulated its reasoning on the "due course" issue broadly, the facts of this case are quite distinct from those of *Powell*.

Court's uncontested finding that they were not prejudiced by any delay in receiving the notice. Pet. App. 7, 16-17; see Pet. 19.

Petitioners also appear to suggest a test based on some conception of what might be considered a "normal" time or procedure for postal delivery. See, *e.g.*, Pet. 19-20. As a legal matter, however, the court of appeals correctly observed that there is "no basis in the statutory scheme" for any such test or rule. Pet. App. 7. As a factual matter, moreover, the Tax Court specifically rejected any claim that petitioners did not receive their notice "in due course" even under such a test. Pet. App. 18-19. There is no basis for further review of either of those conclusions.

4. Finally, petitioners argue that they have been deprived of equal protection of the law "by the Tenth Circuit's distinguishing them from taxpayers who received misaddressed notices of deficiency after the time the limitations period for assessment of tax was due to expire, where the notices were mailed twice rather than once." Pet. 22, citing *Reddock* v. *Commissioner*, 72 T.C. 21 (1979), and *Weber* v. *Commissioner*, 46 T.C.M. (CCH) 1568 (1983). But 26 U.S.C. 6503(a), suspending the statute of limitations "after the mailing" of an effective notice of deficiency, itself dictates the differing result. Petitioners' notice was mailed only once, before the expiration of the applicable limitations period, and was received well within the period prescribed for filing a Tax Court petition. In *Reddock* and *Weber*, by contrast, the original deficiency notice mailings were defective, were *never received* by the taxpayers, and were therefore held ineffective to toll the statute of

limitations; the Commissioner remailed the notices after the limitations period had expired. As the court of appeals below concluded, "a clearly rational distinction exists between those taxpayers [who] receive a notice mailed before the three-year period expires and those who do not." Pet. App. 8. Petitioners here actually received the notice to which they were entitled without prejudicial delay, and have not been deprived of any statutory or constitutional right.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

JAMES A. BRUTON
Acting Assistant Attorney General

GILBERT S. ROTHENBERG
REGINA S. MORIARTY
Attorneys

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